

EXHIBIT 9



1 RONALD RUS, #67369
 2 rrus@rusmiliband.com
 3 LEO J. PRESIADO, #166721
 4 lpresiado@rusmiliband.com
 5 RUS, MILIBAND & SMITH
 6 A Professional Corporation
 7 Seventh Floor
 8 2211 Michelson Drive
 9 Irvine, California 92612
 Telephone: (949) 752-7100
 Facsimile: (949) 252-1514

10 Attorneys for Defendants
 11 THUNDERWOOD HOLDINGS, INC.,
 12 BRIAN DUNNING, and BRIANDUNNING.COM

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

EBAY INC.,) CASE NO. C 08-4052 JF
 Plaintiff,)
 vs.)
 DIGITAL POINT SOLUTIONS, INC.;)
 SHAWN HOGAN; KESSLER's FLYING)
 CIRCUS; THUNDERWOOD HOLDINGS,)
 INC.; TODD DUNNING; DUNNING)
 ENTERPRISES, INC.; BRIAN DUNNING;)
 BRIANDUNNING.COM; and DOES 1-20,)
 Defendants.)

PROPOUNDERING PARTY: PLAINTIFF EBAY INC.

RESPONDING PARTY: DEFENDANT THUNDERWOOD HOLDINGS, INC.

SET NO.: ONE (1)

Defendant Thunderwood Holdings, Inc. ("Defendant" and/or "Responding Party") hereby responds to the First Set of Requests for Admission (Nos. 1-25) propounded by Plaintiff eBay Inc. ("Plaintiff" and/or "Propounding Party") as follows:

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GENERAL STATEMENT

2 Defendant's Motion to Dismiss Plaintiff's First Amended Complaint was
3 granted by Order entered February 24, 2009. As such, Plaintiff's Complaint has been
4 dismissed with leave to amend. No amended complaint has been filed and/or served in
5 this action. As such, there is no pending claim against Defendant and Defendant is not
6 required to respond to Plaintiff's discovery request. In this regard, Defendant requested
7 that Plaintiff acknowledge that no response is required or, in the alternative, grant
8 Defendant an extension of time to respond to the discovery requests until some time after
9 Plaintiff files an amended complaint against Defendant, if at all. Plaintiff refused
10 Defendant's request without explanation. Defendant serves these responses out of an
11 abundance of caution in the event it is determined that such responses are required despite
12 the dismissal of Plaintiff's Complaint against Defendant. Otherwise, Defendant reserves
13 the right to withdraw these responses in total and otherwise object to the use, reference to,
14 or disclosure of these responses in any manner for any purpose.

15 Brian Dunning (“Mr. Dunning”) has invoked his privilege against
16 self-incrimination pursuant to the Fifth Amendment to the U.S. Constitution, *Lefkowitz v.*
17 *Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence Rule 501, Article 1, Section 15 of
18 the California Constitution, and California Evidence Code section 940. Since Mr. Dunning is
19 the sole shareholder and sole authorized representative of Responding Party, and the only
20 person who can verify discovery responses on behalf of Responding Party, Responding Party
21 cannot provide any verified responses without compromising Mr. Dunning's right against
22 self-incrimination.

23 Should Mr. Dunning determine that there is no longer the threat of potential
24 criminal prosecution and elect to withdraw his privilege against self-incrimination in the future,
25 Responding Party expressly reserves the right to supplement its responses.

26 Furthermore, the Federal Bureau of Investigation has seized all documents and
27 computers, disk drives, hard drives, cell phones and servers containing information potentially
28 related to this matter. Assistant United States Attorney Kyle F. Waldinger in charge of this

1 investigation has refused all requests to provide Defendants with a copy of the material seized
2 by the FBI. Those items and records may contain information responsive to the requests
3 below, but those items and records are not in the possession, custody or control of Defendants.

4 **RESPONSES**

5 **REQUEST FOR ADMISSION NO. 1:**

6 Admit that Thunderwood conducted business with eBay during at least some
7 portion of 2007.

8 **RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

9 Responding Party objects to this request on the grounds that it violates
10 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
11 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
12 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
13 section 940. Responding Party further objects on the ground that this request is vague and
14 ambiguous.

15 **REQUEST FOR ADMISSION NO. 2:**

16 Admit that Thunderwood conducted business with eBay during at least some
17 portion of 2006.

18 **RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

19 Responding Party objects to this request on the grounds that it violates
20 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
21 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
22 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
23 section 940.

24 **REQUEST FOR ADMISSION NO. 3:**

25 Admit that Thunderwood conducted business with eBay during at least some
26 portion of 2005.

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1 **RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

2 Responding Party objects to this request on the grounds that it violates
3 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
4 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
5 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
6 section 940. Responding Party further objects on the ground that this request is vague and
7 ambiguous.

8 **REQUEST FOR ADMISSION NO. 4:**

9 Admit that Thunderwood conducted business with eBay during at least some
10 portion of 2004.

11 **RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

12 Responding Party objects to this request on the grounds that it violates
13 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
14 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
15 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
16 section 940. Responding Party further objects on the ground that this request is vague and
17 ambiguous.

18 **REQUEST FOR ADMISSION NO. 5:**

19 Admit that Thunderwood conducted business with eBay during at least some
20 portion of 2003.

21 **RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

22 Responding Party objects to this request on the grounds that it violates
23 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
24 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
25 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
26 section 940. Responding Party further objects on the ground that this request is vague and
27 ambiguous.

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1 **REQUEST FOR ADMISSION NO. 6:**

2 Admit that Thunderwood participated in an eBay Affiliate Marketing Program or
3 programs.

4 **RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

5 Responding Party objects to this request on the grounds that it violates
6 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
7 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
8 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
9 section 940. Responding Party further objects on the ground that this request is vague and
10 ambiguous.

11 **REQUEST FOR ADMISSION NO. 7:**

12 Admit that, while participating in an eBay Affiliate Marketing Program or
13 programs, Thunderwood utilized software programs and/or code that caused some Users'
14 computers to access an eBay website without the User's knowledge.

15 **RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

16 Responding Party objects to this request on the grounds that it violates
17 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
18 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
19 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
20 section 940. Responding Party further objects on the ground that this request is vague and
21 ambiguous.

22 **REQUEST FOR ADMISSION NO. 8:**

23 Admit that, while participating in an eBay Affiliate Marketing Program or
24 programs, Thunderwood utilized software programs and/or code that caused some Users'
25 computers to access an eBay web server without the User's knowledge.

26 **RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

27 Responding Party objects to this request on the grounds that it violates
28 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the

1 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
 2 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
 3 section 940. Responding Party further objects on the ground that this request is vague and
 4 ambiguous.

5 **REQUEST FOR ADMISSION NO. 9:**

6 Admit that, while participating in an eBay Affiliate Marketing Program or
 7 programs, Thunderwood utilized software programs and/or code that redirected a User to an
 8 eBay website without the User knowingly clicking on an Advertisement Link.

9 **RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

10 Responding Party objects to this request on the grounds that it violates
 11 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
 12 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
 13 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
 14 section 940. Responding Party further objects on the ground that this request is vague and
 15 ambiguous.

16 **REQUEST FOR ADMISSION NO. 10:**

17 Admit that, while participating in an eBay Affiliate Marketing Program or
 18 programs, Thunderwood utilized software programs and/or code that redirected a User to an
 19 eBay web server without the User knowingly clicking on an Advertisement Link.

20 **RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

21 Responding Party objects to this request on the grounds that it violates
 22 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
 23 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
 24 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
 25 section 940. Responding Party further objects on the ground that this request is vague and
 26 ambiguous.

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1 **REQUEST FOR ADMISSION NO. 11:**

2 Admit that, while participating in an eBay Affiliate Marketing Program or
3 programs, Thunderwood utilized software programs and/or code that performed Cookie
4 Stuffing.

5 **RESPONSE TO REQUEST FOR ADMISSION NO. 11:**

6 Responding Party objects to this request on the grounds that it violates
7 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
8 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
9 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
10 section 940. Responding Party further objects on the ground that this request is vague and
11 ambiguous.

12 **REQUEST FOR ADMISSION NO. 12:**

13 Admit that Thunderwood used methods, techniques and/or technological
14 measures to avoid detection by eBay of certain aspects of how Thunderwood interacted with
15 eBay's Affiliate Marketing Program or programs.

16 **RESPONSE TO REQUEST FOR ADMISSION NO. 12:**

17 Responding Party objects to this request on the grounds that it violates
18 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
19 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
20 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
21 section 940. Responding Party further objects on the ground that this request is vague and
22 ambiguous.

23 **REQUEST FOR ADMISSION NO. 13:**

24 Admit that Thunderwood used methods, techniques and/or technological
25 measures to avoid detection by Commission Junction of certain aspects of how Thunderwood
26 interacted with eBay's Affiliate Marketing Program or programs.

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1 **RESPONSE TO REQUEST FOR ADMISSION NO. 13:**

2 Responding Party objects to this request on the grounds that it violates
3 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
4 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
5 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
6 section 940. Responding Party further objects on the ground that this request is vague and
7 ambiguous.

8 **REQUEST FOR ADMISSION NO. 14:**

9 Admit that Thunderwood utilized methods, techniques and/or technological
10 measures to avoid detection by eBay of Cookie Stuffing caused by Thunderwood.

11 **RESPONSE TO REQUEST FOR ADMISSION NO. 14:**

12 Responding Party objects to this request on the grounds that it violates
13 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
14 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
15 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
16 section 940. Responding Party further objects on the ground that this request is vague and
17 ambiguous.

18 **REQUEST FOR ADMISSION NO. 15:**

19 Admit that Thunderwood utilized methods, techniques and/or technological
20 measures to avoid detection by Commission Junction of Cookie Stuffing caused by
21 Thunderwood.

22 **RESPONSE TO REQUEST FOR ADMISSION NO. 15:**

23 Responding Party objects to this request on the grounds that it violates
24 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
25 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
26 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
27 section 940. Responding Party further objects on the ground that this request is vague and
28 ambiguous.

1 **REQUEST FOR ADMISSION NO. 16:**

2 Admit that, while participating in an eBay Affiliate Marketing Program or
3 programs, Thunderwood utilized software and/or code to determine the geographic location of
4 a User.

5 **RESPONSE TO REQUEST FOR ADMISSION NO. 16:**

6 Responding Party objects to this request on the grounds that it violates
7 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
8 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
9 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
10 section 940. Responding Party further objects on the ground that this request is vague and
11 ambiguous.

12 **REQUEST FOR ADMISSION NO. 17:**

13 Admit that, while participating in an eBay Affiliate Marketing Program or
14 programs, Thunderwood utilized software and/or code to determine whether a User was
15 located in San Jose, CA.

16 **RESPONSE TO REQUEST FOR ADMISSION NO. 17:**

17 Responding Party objects to this request on the grounds that it violates
18 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
19 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
20 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
21 section 940. Responding Party further objects on the ground that this request is vague and
22 ambiguous.

23 **REQUEST FOR ADMISSION NO. 18:**

24 Admit that, while participating in an eBay Affiliate Marketing Program or
25 programs, Thunderwood utilized software and/or code to determine whether a User was
26 located in Santa Barbara, CA.

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1 RESPONSE TO REQUEST FOR ADMISSION NO. 18:

2 Responding Party objects to this request on the grounds that it violates
 3 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
 4 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
 5 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
 6 section 940. Responding Party further objects on the ground that this request is vague and
 7 ambiguous.

8 REQUEST FOR ADMISSION NO. 19:

9 Admit that, while participating in an eBay Affiliate Marketing Program or
 10 programs, Thunderwood utilized software and/or code that would disable or not engage
 11 Thunderwood's Cookie Stuffing technology if a User's computer was located in San Jose, CA.

12 RESPONSE TO REQUEST FOR ADMISSION NO. 19:

13 Responding Party objects to this request on the grounds that it violates
 14 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
 15 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
 16 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
 17 section 940. Responding Party further objects on the ground that this request is vague and
 18 ambiguous.

19 REQUEST FOR ADMISSION NO. 20:

20 Admit that, while participating in an eBay Affiliate Marketing Program or
 21 programs, Thunderwood utilized software and/or code that would disable or not engage
 22 Thunderwood's Cookie Stuffing technology if a User's computer was located in Santa Barbara,
 23 CA.

24 RESPONSE TO REQUEST FOR ADMISSION NO. 20:

25 Responding Party objects to this request on the grounds that it violates
 26 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
 27 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
 28 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code

1 section 940. Responding Party further objects on the ground that this request is vague and
 2 ambiguous.

3 **REQUEST FOR ADMISSION NO. 21:**

4 Admit that Thunderwood received commissions from eBay, whether directly or
 5 through Commission Junction, that were based, in whole or in part, on Users whose computers
 6 were directed to eBay's website without the User's knowledge.

7 **RESPONSE TO REQUEST FOR ADMISSION NO. 21:**

8 Responding Party objects to this request on the grounds that it violates
 9 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
 10 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
 11 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
 12 section 940. Responding Party further objects on the ground that this request is vague and
 13 ambiguous.

14 **REQUEST FOR ADMISSION NO. 22:**

15 Admit that Thunderwood received commissions from eBay, whether directly or
 16 through Commission Junction, that were based, in whole or in part, on Users who had never
 17 actually clicked on a Thunderwood-sponsored eBay advertisement link.

18 **RESPONSE TO REQUEST FOR ADMISSION NO. 22:**

19 Responding Party objects to this request on the grounds that it violates
 20 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
 21 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
 22 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
 23 section 940. Responding Party further objects on the ground that this request is vague and
 24 ambiguous.

25 **REQUEST FOR ADMISSION NO. 23:**

26 Admit that Thunderwood received commissions from eBay, whether directly or
 27 through Commission Junction, that were based, in whole or in part, Cookie Stuffing caused by
 28 Thunderwood.

1 **RESPONSE TO REQUEST FOR ADMISSION NO. 23:**

2 Responding Party objects to this request on the grounds that it violates
3 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
4 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
5 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
6 section 940. Responding Party further objects on the ground that this request is vague and
7 ambiguous.

8 **REQUEST FOR ADMISSION NO. 24:**

9 Admit that Thunderwood engaged in Cookie Stuffing with the intent to defraud
10 eBay.

11 **RESPONSE TO REQUEST FOR ADMISSION NO. 24:**

12 Responding Party objects to this request on the grounds that it violates
13 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
14 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
15 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code
16 section 940. Responding Party further objects on the ground that this request is vague,
17 ambiguous, and constitutes a legal conclusion.

18 **REQUEST FOR ADMISSION NO. 25:**

19 Admit that Thunderwood defrauded eBay.

20 **RESPONSE TO REQUEST FOR ADMISSION NO. 25:**

21 Responding Party objects to this request on the grounds that it violates
22 Mr. Dunning's privilege against self-incrimination pursuant to the Fifth Amendment to the
23 U.S. Constitution, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Federal Rules of Evidence
24 Rule 501, Article 1, Section 15 of the California Constitution, and California Evidence Code

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1 section 940. Responding Party further objects on the ground that this request is vague,
2 ambiguous, and constitutes a legal conclusion.

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4 DATED: February 26, 2009

RUS, MILIBAND & SMITH
A Professional Corporation

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By:

7 LEO J. PRESIADO
8 Attorneys for Defendants
9 Thunderwood Holdings, Inc., Brian Dunning
and BrianDunning.com

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PROOF OF SERVICE

eBay, Inc. v. Digital Point Solutions, Inc., et al.
Northern District of California, San Jose Division
Case No. C 08-4052 JF

4 STATE OF CALIFORNIA)
5 COUNTY OF ORANGE)) ss.

6 I am employed in the County of Orange, State of California. I am over the age
7 of 18 and not a party to the within action; my business address is 2211 Michelson Drive,
Seventh Floor, Irvine, California 92612.

8 On February 26, 2009, I served the foregoing documents described as
9 **RESPONSES OF DEFENDANT THUNDERWOOD HOLDINGS, INC. TO FIRST SET**
10 **OF REQUESTS FOR ADMISSION PROPOUNDED BY PLAINTIFF EBAY, INC.** on the
interested parties in this action by placing a copy thereof enclosed in sealed envelopes
addressed as follows:

SEE ATTACHED SERVICE LIST

✓ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

— (By E-Mail) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons.

— (By Facsimile) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons by facsimile.

— (By Hand Delivery) As follows: I caused the above-referenced document(s) to be hand delivered to the above-named persons.

— (By Overnight Delivery) As follows: By overnight delivery via Overnite Express and/or Federal Express to the office of the addressee noted on the attached service list.

Executed on February 26, 2009, at Irvine, California.

24 (Federal) I declare that I am employed in the office of a member of the bar of this court
25 at whose direction the service was made. *[Signature]*



RHONDA RADFORD

SERVICE LIST

*eBay, Inc. v. Digital Point Solutions, Inc., et al.
Northern District of California, San Jose Division
Case No. C 08-4052*

David R. Eberhart
Sharon M. Bunzel
Colleen M. Kennedy
O'Melveny & Myers
Two Embarcadero, 20th Floor
San Francisco, CA 94111
Tel: (949) 984-8700
Fax: (949) 984-8701
Email: deberhart@omm.com, sbunzel@omm.com
Attorneys for Plaintiff eBay, Inc.

10 Stewart H. Foreman
Freeland, Cooper & Foreman, LLP
11 150 Spear Street, Suite 1800
San Francisco, CA 94105
12 Tel: (949) 541-0200
Fax: (949) 495-4332
13 Email: foreman@freelandlaw.com
14 *Attorneys for Defendants Todd Dunning and Dunning Enterprises, Inc.*

15 Seyamack Kouretchian
16 Coast Law Group, LLP
17 169 Saxony Road
18 Suite 204
19 Encinitas, CA 92024
20 Tel: (760) 942-8505
21 Fax: (760) 942-8515
22 Email: seyamack@coastlawgroup.com
23 *Attorneys for Digital Point Solutions, Inc. and Shawn Hogan*

20 Patrick K. McClellan
21 Law Offices of Patrick K. McClellan
22 2211 Michelson Drive, Suite 700
23 Irvine, California 92612
Tel: (949) 261-7615
Fax: (949) 851-2772
Email: pkellymc@pacbell.net
24 Attorney for *Kessler's Flying Circus*